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PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC990191

**For arbitration of interconnection
rates, terms and conditions and
related relief**

REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER

April 14, 2000

On October 18, 1999, Cavalier Telephone, LLC ("Cavalier") filed an informal complaint ("Petition") with the State Corporation Commission ("Commission") against Bell Atlantic-Virginia, Inc. ("BA-VA"), alleging violation of the Telecommunications Act of 1996 ("Telecom Act") and breach of the interconnection agreement between the parties. Cavalier further petitioned the Commission for arbitration of unresolved interconnection issues between BA-VA and Cavalier related to the installation of and recurring charges for digital subscriber line ("DSL") loops. In addition to injunctive relief and other remedies, Cavalier requests the Commission to award Cavalier damages, including expenses and attorney's fees.

On November 12, 1999, BA-VA filed a Motion to Dismiss arguing that Cavalier's request is premature and that BA-VA is already offering Cavalier the interim relief it seeks in its Petition.

On January 5, 2000, Cavalier filed a Petition to Convert Informal Complaint into Formal Proceeding, pursuant to Rule 5:6 of the Commission Rules of Practice and Procedure and Reply to Response of BA-VA.

On February 11, 2000, the Commission issued an Order Initiating Formal Proceeding ("Order") converting Cavalier's informal complaint into a formal proceeding and directed BA-VA to file an Answer or other responsive pleading by February 24, 2000. The Commission further ordered the parties to file briefs on March 6, 2000, on the following issues:

1. Is jurisdiction over this complaint properly before this Commission, the Federal Communications Commission ("FCC"), or a state or federal court of general jurisdiction?
2. If jurisdiction over the complaint properly lies with this Commission, what remedies are available to the Commission?
3. Is there a basis in Virginia law for the Commission to assert or exercise jurisdiction over the request for the Commission to arbitrate unresolved issues between the parties that is independent of any authority contained in the Act?

4. Should the Commission establish a generic case to establish BA-VA's prices for DSL loops as an unbundled network element and is there a basis to do so under state law?

The Commission further expressed interest in whether state law might serve as the basis for exercising jurisdiction in this matter without waiving (constructively or otherwise) state immunity under the Eleventh Amendment to the United States Constitution.¹

On February 24, 2000, BA-VA filed an Answer, a Motion to Dismiss, and a Motion for a Definite Statement. In its Answer, BA-VA states that Cavalier's alleged facts and legal arguments do not constitute any material breach of the interconnection agreement or violation of law. In its Motion to Dismiss, BA-VA requests the Commission to dismiss certain portions of Cavalier's Complaint because of lack of factual information and failure to state a claim. In its Motion for a More Definite Statement, BA-VA states that it has insufficient information to investigate certain alleged violations and lists the specific allegations for which it requires additional information.

On March 15, 2000, Cavalier filed a Response to BA-VA's February 24 Motions, charging that it had provided specific examples of each of the types of problems identified in its Complaint and its Petition and Reply.² Cavalier requests that BA-VA's February 24th Motions be denied and that it be afforded an evidentiary hearing on its complaint.

Pursuant to the Commission's Order, on March 6, 2000, the parties filed briefs addressing the issues designated above. Both Cavalier and BA-VA agree the Commission has jurisdiction under state and federal law to resolve interconnection agreement disputes and enforce the interconnection agreements by means of remedies provided to the Commission under Virginia law. BA-VA maintains, however, that the Commission does not have authority to award damages arising out of interconnection agreements or authority to amend the interconnection agreement to establish additional performance standards.³

BA-VA submits the Commission has the authority under its rules to establish a generic proceeding; however, BA-VA offers no opinion on whether such a proceeding should be established.⁴ Cavalier also agrees the Commission has the authority to establish a generic proceeding and encourages the Commission to do so as long as it would not delay the timely resolution of Cavalier's petition.⁵

¹Commission Order at 3.

²Cavalier Response at 3.

³BA-VA Brief at 8, 9.

⁴BA-VA Brief at 14.

⁵Cavalier Brief at 13.

BA-VA acknowledges the Commission's Eleventh Amendment concerns, but states that this should not deter the Commission from fulfilling its duty under state law to resolve interconnection disputes.⁶ Cavalier maintains that the Commission possesses the expertise and the legal obligation to decide disputes regarding interconnection agreements.⁷

DISCUSSION

I. Is jurisdiction over this complaint properly before this Commission, the Federal Communications Commission ("FCC"), or a state or federal court of general jurisdiction?

Under the provisions of the Telecom Act and Virginia Law, this Commission has jurisdiction over the connection of services between telephone companies of this Commonwealth. The Telecom Act specifically provides that state commissions are to approve interconnection agreements.⁸ Subsection 252(e)(3) of the Telecom Act provides that state commissions have the authority to require compliance with intrastate telecommunications service quality standards or requirements. Only if the Commission declines to act can the FCC issue an order preempting the state commission's jurisdiction.⁹

Subsection 252(e)(4) of the Telecom Act precludes state courts from reviewing actions of a state commission in approving or rejecting an interconnection agreement *pursuant to the Telecom Act*. Unless the Commission makes a decision that is outside the parameters of the Telecom Act, the Virginia Supreme Court would not have jurisdiction to review the appeal. Under Subsection 252(e)(6) of the Telecom Act, review of a Commission decision applying federal law would be made by a federal district court.

Federal courts have confirmed the power of state commissions to make an initial determination of claims arising from interconnection agreements. The federal district court in *Bell Atlantic-Virginia, Inc. v. Worldcom Technologies of Virginia, Inc.*¹⁰ held that federal district court jurisdiction over a dispute concerning a telephone interconnection agreement exists when the claim arises from a state commission determination. In *Indiana Bell Tel. Co. v. McCarty*¹¹, the district court also held that it lacked jurisdiction to review counterclaims concerning the interpretation of negotiated agreement terms because they had not been raised before the state commission.

⁶BA-VA Brief at 2.

⁷Cavalier Brief at 17.

⁸47 U.S.C. § 252(e).

⁹47 U.S.C. § 252(e)(5).

¹⁰70 F. Supp. 2d 620 (E.D. Va. 1999).

¹¹30 F. Supp. 2d 1100 (S.D. Ind. 1998).

Moreover, as discussed below, Virginia law provides the Commission with jurisdiction over this complaint.¹²

II. If jurisdiction over the complaint properly lies with this Commission, what remedies are available to the Commission?

This Commission is a constitutional agency, empowered to interpret and enforce interconnection agreements, applying both state and federal law in the process. The remedies available to the Commission are found in Sections 12.1-13 and 56-6 of the Code of Virginia. In the exercise of this authority, the Commission can issue orders and injunctions and impose fines and penalties prescribed by state law.¹³ The Commission, however, does not have authority to award damages as requested by Cavalier.¹⁴ The Telecom Act provides in Subsection 207 that any person claiming to be damaged by a common carrier can complain either to the FCC or to federal district court, but not both.

III. Is there a basis in Virginia law for the Commission to assert or exercise jurisdiction over the request for the Commission to arbitrate unresolved issues between the parties that is independent of any authority contained in the Act?

The Telecom Act specifically provides that a state is not prohibited from establishing or enforcing other requirements of state law¹⁵ in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.¹⁶

This Commission has, for decades, exercised regulatory authority over telephone companies operating in Virginia. Section 56-479 of the Code of Virginia charges the Commission to “make and enforce such requirements, rules and regulations as in its judgment will promote the efficiency of the (telephone) service to be rendered. . . .” Section 56-482 provides that, “[u]pon demand of either party thereto or any person affected thereby all arrangements and agreements whatever between two or more telephone companies doing business in this Commonwealth. . . shall be submitted to the Commission for inspection and. . . approval.” The Commission promulgated rules¹⁷ that provide for the Commission to resolve any interconnection request and determine

¹² Sections 56-479 and 56-482 of the Code of Virginia.

¹³Section 56-6 of the Code of Virginia.

¹⁴*Appalachian Power Company v. John Stewart Walker, Inc.*, 214 Va. 524 (1974).

¹⁵This preservation of state authority is subject to two exceptions: the restrictions on grounds for rejections of agreements found in paragraph 2 of Section 252(e), and removal of barriers to entry for competing local exchange companies found in Section 253 of the Telecom Act.

¹⁶47 U.S.C. § 252(e)(B)(3).

¹⁷*Ex Parte: In the matter of investigating local exchange telephone competition, including adopting rules pursuant to Virginia Code § 56-265.4: 4.C.3*, Case No. PUC950018, 1995 S.C.C. Ann. Rep. 249 (hereinafter “Order Adopting Rules”).

whether the agreements are reasonable and nondiscriminatory.¹⁸ These rules encompass local exchange interconnection agreements that traditionally fall within the control of state commissions. Clearly, in addition to the authority granted under the Telecom Act, this Commission has jurisdiction in this matter under Virginia law.

Also, under Virginia law, the Commission has authority to resolve interconnection issues between local exchange telephone companies, approve interconnection agreements, and interpret and enforce such interconnection agreements. Pursuant to Section 56-265.4:4 of the Code of Virginia, the Commission promulgated rules requiring competing local exchange companies to enter into interconnection agreements and to submit the agreements to the Commission.¹⁹ Rule VAC 5-400-180(F)(5) provides that the Commission will resolve any interconnection request and determine whether the agreements are reasonable and nondiscriminatory.

Therefore, there is a basis in Virginia law for the Commission to assert or exercise jurisdiction over the request for the Commission to arbitrate unresolved issues between the parties that is independent of any authority contained in the Telecom Act.

IV. Should the Commission establish a generic case to establish BA-VA's prices for DSL loops as an unbundled network element and is there a basis to do so under state law?

The Commission has the authority under its rules to create a generic case to establish BA-VA's prices for DSL loops as an unbundled network element ("UNE"). First, the Commission's rules provide the opportunity for other parties to intervene in an arbitration proceeding.²⁰ Second, the rules permit the Commission to consolidate proceedings and decide whether to hold a hearing.²¹ The Commission's rules were adopted pursuant to its authority under state law,²² therefore there is a basis under state law for the Commission to establish a generic proceeding. For example, the Commission held a generic proceeding to determine BA-VA's UNE rates,²³ and a generic proceeding should be held to establish BA-VA's prices for DSL loops as an UNE as well. However, converting this petition to a generic proceeding would delay the resolution of Cavalier's complaints contained in its petition.

¹⁸20 VAC 5-400-180(F)(5).

¹⁹Order Adopting Rules; Rules for Interconnection, 20 VAC 5-400-180(F).

²⁰20 VAC 5-400-190(C).

²¹20 VAC 5-400-190(A)(8).

²²Va. Code § 12.1-13.

²³*Ex Parte: To determine prices Bell Atlantic-Virginia is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law*, Case No. PUC970005, 1998 S.C.C. Ann. Rep. 213.

Eleventh Amendment

Can the Commission apply Virginia law in exercising jurisdiction in this matter without waiving (constructively or otherwise) state immunity under the Eleventh Amendment to the United States Constitution?

There are two issues involved in the consideration of Eleventh Amendment immunity. The first issue is whether state commissions can be made a party in federal court under the Telecom Act. The second issue is the extent of federal court versus state court review of state commission determinations regarding interconnection agreements.

The Eleventh Amendment of the United States Constitution provides state immunity from suit in federal court brought by a private entity. A state's Eleventh Amendment immunity extends to state agencies which would imply state commissions.²⁴ One exception to this constitutional bar is that individuals may sue a state if the state has waived its immunity and consented to suit in federal court.²⁵

Section 252(e)(6) of the Telecom Act provides:

Any party aggrieved by a state commission's determination may bring an action in an appropriate federal court to determine whether the agreement or statement meets the requirements of § 251 and this section.

This brings into question whether state commissions can be sued in federal court.

The federal district court in Maryland held that the Eleventh Amendment does protect state commissions from federal jurisdiction.²⁶ The Maryland court decided that Congress does not have the power to abrogate states' Eleventh Amendment immunity. The Maryland court, however, recognizes that other courts have held that state commissions are not afforded immunity when acting pursuant to the Telecom Act. The Seventh Circuit, in the case of *MCI Telecommunications Corp. v. Illinois Commerce Commission* ("MCI v. Illinois")²⁷ held that "a state's decision to exercise regulatory authority, which would otherwise remain under exclusively federal control, triggers waiver of its sovereign immunity from suit in federal court".²⁸ As determined by the Seventh Circuit, Congress gave states a choice. The states can participate in the federal regulatory

²⁴ *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) citing *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987).

²⁵ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

²⁶ *Wisconsin Bell Atlantic-Maryland v. MFS Intelenet of Maryland, Inc.*, 1999 U.S. Dist. Lexis 16477 (D. Md. 1999).

²⁷ 183 F.3d 558 (7th Cir. 1999).

²⁸ *MCI v. Illinois*, 183 F.3d 558, 567 (7th Cir. 1999). See also *Bell Atlantic Delaware, Inc. v. Robert J. McMahon, et al.*, 80 F.Supp. 2d 218 (D.Del. 2000), where the court held that the Delaware Public Service Commission waived sovereign immunity by approving an interconnection agreement pursuant to the Telecom Act.

function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out the federal regulatory function without their participation.²⁹

The issue of state commission immunity under the Eleventh Amendment should ultimately be decided by the United States Supreme Court. Currently, there are more decisions against affording states immunity under the Eleventh Amendment than in support of it.

The other question regarding Eleventh Amendment immunity is whether state commission decisions are to be reviewed by the federal courts. In cases decided thus far, courts have differed on whether the review of a state commission order interpreting and enforcing an interconnection agreement should proceed at the state level or through the federal district courts. In *Bell South Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc. and the North Carolina Utilities Commission*,³⁰ the federal district court for the western district of North Carolina addressed the question of whether federal jurisdiction for review of state commission orders is limited to decisions approving or rejecting interconnection agreements, or whether federal jurisdiction extends to state decisions interpreting or enforcing interconnection agreements. The court held that federal district courts have exclusive jurisdiction to review state commission decisions interpreting and enforcing interconnection agreements under § 252.³¹ The key point is whether a state commission decision is made pursuant to the Telecom Act.³² If it is, federal district courts have jurisdiction under § 252(e)(6) to review the state commission decision.

As discussed previously in this Report, state law also gives the Commission jurisdiction in this matter. Section 56-482 of the Code of Virginia grants the Commission authority to inspect and approve all arrangements and agreements between two or more telephone companies operating in Virginia. Further, subsection 252(e)(3) of the Telecom Act expressly provides:

Notwithstanding paragraph (2), but subject to section 253 of this title,³³ nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

²⁹Id. at 566.

³⁰1999 U.S. Dist. Lexis 12783 (W.D. N.C. 1999).

³¹Citing *Michigan Bell v. MFS Intelenet*, 16 F. Supp. 2d 817, 823 (W.D. Mich. 1998).

³²Subsection 252(e)(6) provides for federal court review of state commission decisions made “under this section.”

³³Paragraph 2 of 252(e) sets limitations on state commissions in rejecting an agreement. Subsection 253 pertains to removal of barriers to entry and provides for entry for competing entities.

The federal district court for Puerto Rico³⁴ held that:

This court has subject matter jurisdiction under the Act only when a state regulator applies federal law in its acceptance or rejection of an interconnection agreement.

If the Cavalier complaint is determined to pertain to intrastate telephone service, the argument can be made that the Commission is exercising jurisdiction under Virginia law in this matter without waiving state immunity under the Eleventh Amendment to the United States Constitution. In this regard, the federal district court for the eastern district of Arkansas held that a state commission's interpretation and enforcement of a privately negotiated interconnection agreement is a matter of state contract law that should be reviewed by a state court.³⁵

However, the Commission has adopted rules³⁶ for implementing § 251 and § 252 of the Telecom Act. The Virginia Supreme Court in *Virginia Committee for Fair Utility Rates v. Vepco* held that agencies must follow their properly promulgated rules.³⁷ Therefore, if the Commission resolves matters involving interconnection agreements pursuant to the Telecom Act, review of the Commission's decision would be made by the federal district court.

FINDINGS AND RECOMMENDATIONS

Based on the law and pleadings filed in this case, I find that:

1. The Commission has jurisdiction to hear this complaint;
2. The Commission has the power of injunction and mandamus as remedies in this proceeding;
3. There is a basis in Virginia law for the Commission to assert or exercise jurisdiction over Cavalier's petition;
4. Pursuant to the Commission's Rules the Commission can and should establish a generic case to establish BA-VA's prices for DSL loops and an unbundled network element.

Accordingly, ***I RECOMMEND*** the Commission adopt the findings set forth above.

³⁴*Puerto Rico Telephone v. Telecomm. Regulatory Board*, 20 F. Supp. 2d 308, 311 (D. Puerto Rico 1998).

³⁵*Southwestern Bell Tele. V. Connect Communications*, 72 F. Supp. 2d 1043, 1049 (E.D. Ark. 1999).

³⁶Order Adopting Rules.

³⁷243 Va. 320, 328 (1992).

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

Howard P. Anderson, Jr.
Hearing Examiner